NO. 46146-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

OMAR ALEJANDRO MORENO-VALENTIN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-02269-9

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE

Diana Ruiz (hereafter 'Ruiz') and Omar Moreno (hereafter 'Moreno') dated, lived together, and had a child in common. 2RP at 215-17. Their relationship degraded over time and Moreno had sometimes called Ruiz names like "bitch" and "slut," sometimes in front of their son. 2RP at 216, 235-36. During prior arguments, Moreno punched and broke two doors to the apartment they shared. 2 RP at 221. Moreno also threw game controllers and sometimes pushed Ruiz away when she tried to hug him during an argument. 2 RP at 222. On December 2, 2013, Moreno contacted Ruiz while she was at work and asked her to come home as soon as possible. 2 RP at 272. Moreno was angry, accused Ruiz of cheating on him, and confronted her about text messages he found on her phone. 2RP at 225, 234. During this incident, Moreno pulled Ruiz's hair and threw her against the couch causing her to hit her head on the couch's wooden frame and bruising her face. 2RP at 225. Moreno then left their home with their

son. 2RP at 232-33. Later, when Moreno returned home, they continued to argue about the text messages. 2RP at 233. Ruiz admitted to having an affair and Moreno called her "bitch" and "slut" and grabbed her by the throat squeezing hard. 2RP at 233-40. Ruiz had trouble breathing. 2RP at 238. Ruiz believed Moreno was going to kill her. 2RP at 239. This occurred in front of their son. 2RP at 240.

Ruiz grabbed a knife and told Moreno she would slit her wrists if he took their son. 2RP at 246. She went into the bathroom with the knife and closed the door in order to frighten Moreno. 2RP at 246-47. Ruiz did not have a phone that worked; and after Moreno refused to give her one, she went next door to see if Moreno's uncle would let her use his. 2RP at 241-45. The uncle did not let Ruiz use his phone. 2RP at 244. Moreno kept threatening to take her son from her, so Ruiz walked to her cousin's house and called the police. 2RP at 245.

One of the officers who responded observed a red mark on Ruiz's neck consistent with a fingermark. 2RP 188-89, 194. Photos of her neck were taken and admitted into evidence at trial. 2RP 188-89.

Moreno denied assaulting Ruiz when he testified at trial. He described how he believed Ruiz was cheating on him and confronted her about that. 3RP at 396. He indicated they were crying and arguing for some time. 3RP at 398. He testified at one point that he had Ruiz's cell

phone in his pocket and she wanted it back and a struggle ensued over the phone. 3RP 401, 410-14. Moreno would not let her have it back until he locked the phone with a password Ruiz did not know. 3 RP at 414. Later that day after he returned home from work, Moreno and Ruiz continued to argue over her phone. 3RP at 417-18. Ruiz grabbed a knife and threatened suicide. 3RP at 419. Moreno took the knife from her every time she picked it up. 3RP at 419-423. Moreno further testified that while on the stairs Ruiz bit his arm and they struggled. 3RP at 425-27. Moreno denied ever grabbing Ruiz by the throat.

During motions in limine, the State moved to admit evidence of Moreno's prior bad acts involving name-calling, damaging their home, and pushing Ruiz. 1RP at 32-130. The trial court allowed the State to admit this evidence pursuant to ER 404(b) and found the probative value outweighed the prejudicial effect. 1RP at 133-35.

The State charged Moreno with Assault in the Second Degree Domestic Violence and alleged the incident occurred within the sight or sound of a minor child. CP 1. Prior to closing arguments, the court and counsel discussed proposed jury instructions. It was clear from the record that Moreno submitted a proposed limiting instruction on the ER 404(b) evidence. 3RP at 500-01. The jury convicted Moreno of Assault in the Second Degree and found the offense was committed by one family or

household member against another and that it occurred within the sight or sound of their minor child. CP 3, 4. This appeal follows.

C. ARGUMENT

I. THE TRIAL COURT PROPERLY ADMITTED THE PRIOR BAD ACTS EVIDENCE

Moreno argues the trial court improperly admitted evidence of his prior bad acts under ER 404(b). While the trial court's declared reasons for admitting the evidence may have been incorrect, the evidence was properly admitted under ER 404(b) to prove Moreno's intent, motive, and common scheme or plan.

A trial court's interpretation of an evidentiary rule is reviewed de novo. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003) (citing *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998)). A trial court's decision to admit evidence is reviewed for an abuse of discretion. *Id.* (citing *State v. Lough*, 125 Wn.2d 847, 856, 889 P.2d 487 (1995)). ER 404(b) bars the admission of prior bad acts for the purpose of proving character and that the person acted in conformity therewith. *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012) (citing *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)). However, prior bad act evidence may be admissible for another purpose. *Id.*

In admitting evidence under ER 404(b), the trial court must first find that the prior act occurred by a preponderance of the evidence, identify the purpose for which the evidence is admissible, evaluate whether the evidence is relevant, and weigh the probative value against the prejudicial effect. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). The trial court shall also give a limiting instruction to the jury if such evidence is admitted at trial. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (citing *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995)).

Our Supreme Court recently held that when a domestic violence victim did not recant, that evidence of the defendant's prior abusive acts against the victim were not admissible to show the victim's credibility or for impeachment because the evidence was more prejudicial than probative. *State v. Gunderson*, 181 Wn.2d 916, 924-26, 337 P.3d 1090 (2014). This case had not yet been decided when the trial court decided the admissibility of the evidence in Moreno's case.

The trial court below admitted the evidence to show the dynamics of the relationship between Moreno and Ruiz, whether Moreno acted in self-defense, and for evaluating Ruiz's credibility. CP 44. *Gunderson, supra* now prohibits admission of the history of a relationship in a domestic violence case where the victim has not recanted, however, this

Court may affirm the trial court's admission of the evidence if it would have been properly admitted for another reason. *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). In *Powell*, the Supreme Court stated that the appellate court may "consider bases mentioned by the trial court as well as other proper bases on which the trial court's admission of evidence may be sustained." *Id.*

ER 404(b) states, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In this case, the evidence of Moreno's prior bad acts was relevant and admissible to show motive, plan, and to rebut claim of self-defense.

In *State v. Powell*, the Washington Supreme Court found that evidence of the defendant's hostile relationship with his wife was properly admitted to show his motive for her murder. *State v. Powell*, 126 Wn.2d at 260-61. The Court found that "motive goes beyond gain and can demonstrate an impulse, desire, or any other moving power which causes an individual to act." *Id.* at 259. As in *Powell*, Moreno had motive to assault his wife. This motive was best evidenced by proof of their hostile relationship including him calling her names and causing damage to their

home during arguments. The evidence was properly admissible under ER 404(b) to show Moreno's motive in assaulting the victim. For example, in *Hoyer*, the Court stated, "[e]vidence of previous quarrels and ill-feeling is admissible to show motive." *State v. Hoyer*, 105 Wn. 160, 163, 177 P. 683 (1919). In this case, it would be difficult for a jury to understand why a person may assault their partner in the way Moreno did. However, in knowing they have a hostile relationship and have a history of hostility and ill-feelings, will give context to the crime and show the jury Moreno's motive. This evidence is highly relevant to show why the crime occurred.

The evidence was also admissible under ER 404(b) to show common scheme or plan. Domestic violence generally follows a pattern of abuse on a victim. Evidence of a common scheme or plan is admissible if the evidence demonstrates not just similarity in results, but common features of the various acts that are naturally explained as being caused by a general plan. *State v. Slocum,* 183 Wn.App. 438, 450, 333 P.3d 541 (2014) (quoting *Lough,* 125 Wn.2d at 860). The abuse suffered by the victim here were not isolated incidents. Moreno's name-calling, degrading, and prior acts of violence in damaging property show a scheme to manipulate and control the victim. This is the hallmark of domestic violence and Moreno manifested this scheme by abusing his victim multiple times over multiple incidents. Evidence of prior acts which

follow a single plan to commit separate but very similar crimes may be admissible under ER 404(b). *State v. Kipp*, 171 Wn. App. 14, 22, 286 P.3d 68 (2012), *reversed on other grounds,* 179 Wn.2d 718, 317 P.3d 1029 (2014). Though Moreno's acts over time were separate acts, he followed a single plan to abuse the mother of his child in order to have power over her and to control her, and thus evidence of his prior acts was admissible at trial to prove common scheme or plan.

The evidence of Moreno's prior bad acts was also admissible to rebut his defense. In *State v. Nelson*, 131 Wn.App. 108, 125 P.3d 1008 (2006), the Court held that a defendant's prior acts of violence against the victim were admissible to rebut the defendant's defense that the victim fabricated the events. As in *Nelson*, here, Moreno claimed the victim's version of events were not accurate, therefore inferring she fabricated the strangulation. Moreno claimed at trial he did this in self-defense, but now asserts self-defense was not a viable defense, and not truly what his defense was. However, even in *Nelson*, the Court properly allowed evidence of prior bad acts simply to rebut a claim of fabrication, not to rebut self-defense. So as in *Nelson*, Moreno's prior violent acts against the victim were admissible to rebut this claim whether his claimed self-defense was a proper defense or not, as either way, Moreno's overall argument had to be that Ruiz's version of events was a fabrication.

There were several valid reasons for admitting the evidence of Moreno's prior bad acts in his relationship with Ms. Ruiz. The trial court's admission of the evidence was permissible and Moreno's claim fails.

II. ANY ERROR IN ADMITTING THE EVIDENCE WAS HARMLESS

Even if this Court finds the trial court should not have admitted the evidence of Moreno's prior bad acts, the admission was harmless. Evidentiary errors under ER 404(b) are not of constitutional magnitude. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Thus, this Court applies the nonconstitutional harmless error standard in determining whether the erroneous admission was harmless. *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207 (2012) (citing *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). This Court must decide whether "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *Id.* (quoting *Smith*, 106 Wn.2d at 780).

Here, the evidence admitted was not overly prejudicial. The evidence that Moreno objects to is evidence that the defendant called the victim names and punched a hole in the wall and pushed her on a prior occasion. This evidence, while not favorable to Moreno, is not of the sort that would ordinarily so offend the average juror as to cause him or her to

ignore the evidence and find Moreno guilty because of what a bad person he is. Instead, this evidence simply provided context to the jury and still required the jury to believe Ms. Ruiz's account of the events beyond a reasonable doubt in order to convict Moreno. The admission of the evidence was harmless. This Court cannot conclude that within reasonable probabilities the outcome would have been different had the evidence not been admitted. The jury also was instructed on how to consider the evidence, and although the trial court's basis for admission of the evidence is not the same as what the State now submits would have been a proper basis, the instruction precluded the jury from considering the evidence as propensity evidence. CP 44. The important aspect of ER 404(b) is its prohibition against use of prior bad acts to show a person acted in conformity therewith. The jury could not use the prior bad acts evidence for that reason. Thus with or without the evidence, the jury had to believe the victim's account beyond a reasonable doubt. From her description and the injuries observed by the officers at the scene, the jury properly convicted Moreno of Assault in the Second Degree. Any error in admitting the evidence of his prior bad acts was harmless because the outcome of the trial would not have been materially affected had this evidence not been admitted. This Court should affirm.

III. MORENO IS PRECLUDED FROM RAISING ERROR HE INVITED

Moreno claims the trial court's instruction regarding the ER 404(b) was erroneous as such an instruction is impossible for a jury to follow. However, Moreno proposed and requested a limiting instruction on the evidence admitted. Therefore, Moreno is precluded by the invited error doctrine from raising this issue now.

The invited error doctrine prevents a party who sets up an error at trial from claiming that very action as error on appeal. *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). In the case of *City of Seattle v. Patu*, 147 Wn.2d 717, 58 P.3d 273 (2002), the defendant proposed an instruction that was missing an essential element of the crime, the court accepted the instruction and the jury convicted the defendant. *Patu*, 147 Wn.2d at 719. On appeal, Patu sought reversal of the conviction based on the trial court's failure to include an essential element of the offense in the instruction. *Id.* The Supreme Court affirmed Patu's conviction and held the invited error doctrine applied because a party may not request an instruction and later complain on appeal that the requested instruction was given. *Id.* at 721. In a similar case, *State v. Studd*, the Court held that the invited error doctrine applied to defendants who proposed an erroneous

instruction at trial and found the defendants could not raise the issue on appeal. *State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999).

Moreno attempts to do what the defendant in *Patu* did: request an instruction and later complain on appeal that the requested instruction was given. *See Patu*, 147 Wn.2d at 721; 3RP at 500-01. As Moreno proposed the instruction he now complains of, the invited error doctrine prevents him from complaining about it now on appeal.

D. CONCLUSION

The evidence of Moreno's prior bad acts was properly admitted and Moreno was properly convicted of Assault in the Second Degree. Moreno is precluded from raising error he invited. Moreno's conviction should be affirmed.

DATED this 23rd day of March, 2015.

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